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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1997

IRIS M. SUMMIT,

Petitioner,

vs.

S-B POWER TOOL (Skil Corporation)
a division of Emerson Electric,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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48 pp

QUESTION PRESENTED FOR REVIEW

The United States Court of Appeals for the Eighth Circuit affirmed the district court granting Respondent a judgment as a matter of law notwithstanding a jury verdict for Petitioner's sexual discrimination claims.

Did the United States Court of Appeals for the Eighth Circuit render a decision which conflicted with previous decisions of the Supreme Court?

Did the United States Court of Appeals for the Eighth Circuit sanction a departure by the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision?

PARTIES TO THE PROCEEDING

Petitioner, Iris M. Summit, is a resident of Walnut Ridge, Arkansas. She was the plaintiff in the lower court proceedings of this case and was the appellant before the United States Court of Appeals for the Eighth Circuit.

Respondent, S-B Power Tool (Skil Corporation) is a division of Emerson Electric Co.

There are no other parties to this action.

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For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On August 13, 1997, the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the decision of the United States District Court for the Eastern District of Arkansas.

On September 30, 1997, the United States Court of Appeals for the Eighth Circuit entered an Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc.

On October 18, 1996, the United States District Court for the Eastern District of Arkansas filed its order, entering judgment for the Defendant/Respondent notwithstanding the jury verdict for the Plaintiff/Petitioner on her claim for sexual discrimination.

The opinion of the United States Court of Appeals for the Eighth Circuit is reproduced in the Appendix at 1a.

The order of the United States Court of Appeals for the Eighth Circuit Denying Petition for Rehearing and Suggestion for Rehearing En Banc is reproduced in the Appendix at 19a.

The Order of the United States District Court for the Eastern District of Arkansas is reproduced in the Appendix at 20a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit and its judgment filed September 30, 1997. That judgment let stand its previous judgment filed August 13, 1997 which affirmed the lower court's granting judgment notwithstanding the verdict for Respondent.

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 703 of the Civil Rights Act of 1964 (Title VII), 29 U.S.C. § 2000e-2(a)(1), provides that it is

> "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin. Harassment on the basis of sex is a violation of Section 703 of Title VII. See 29 U.S.C. § 1604.11(a) (1993).

STATEMENT OF THE CASE

Summit, a 54-year-old woman, with nineteen (19) years of employment with Skil on October 28, 1994, resigned her position as a line supervisor. Summit contends that she was constructively discharged because of her sex and age, claiming a hostile work environment. Summit presented evidence at trial of a series of continuous acts during the year preceding her constructive discharge, of unwarranted reprimands, threats of discharge, and a hostile offensive working environment. Summit had been assigned to supervise an assembly line made up of 46 temporary employees in early June of 1994. Summit continued to supervise the 46 temporaries until her constructive discharge on October 28, 1994, a period of five months. On October 2, 1996, a jury returned a verdict in favor of Summit on her sex discrimination charge, finding that Summit had been constructively discharged. The jury awarded $33,600 in lost wages and benefits, and $10,000 in compensatory damages. The district court had refused to instruct the jury on punitive damages.

Immediately prior to trial, the district court granted Skil's motion in limine, prohibiting Summit from discussing any direct or indirect evidence of sexual harassment which occurred during or prior to 1988 involving the actions of Frank Saterfiel, one of Summit's immediate supervisors in 1988 and 1994. The district court also limited Summit from any direct or indirect reference to evidence of retaliation for complaining of the sexual advancements of Frank Saterfiel made toward her in 1988. The district court prevented a witness for Summit, the human resource manager for Skil up until 1992, Merle Young, from testifying that Frank Saterfiel created an unhealthy situation for Summit, that Saterfiel was tactless and used poor judgment, and placed undue pressure on Summit. The district court further prevented Young from

testifying that Saterfiel had received counseling from Skil because of a negative opinion survey conducted by Skil.

The district court instructed the jury as follows: "Iris Summit contends that she was constructively discharged. In order to prevail on her constructive discharge claim, Iris Summit must prove by a preponderance of the evidence that S-B Power Tool deliberately made her working conditions so intolerable at the time of her resignation that she was forced into an involuntary resignation. In other words, Iris Summit must prove that a reasonable person in her position and circumstances would have felt compelled to resign."

The jury found for Summit on her sexual discrimination claim based on the limited evidence that was submitted.

After the jury verdict was returned, the district court entered judgment for Skil notwithstanding the verdict. On appeal, Summit challenged the district court's judgment notwithstanding the verdict, arguing that: (1) because there was substantial evidence to support the jury's verdict, the district court erred by granting a judgment as a matter of law; (2) the district court erred in limiting the evidence that Summit could present; and (3) the district court erred in failing to instruct the jury on punitive damages. The United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court.

The jury, at the district court level, resolved the factual assertions in favor of Summit, even though the district court prevented Summit from presenting much of her evidence. Summit is entitled to the full benefit of all facts that she proved at trial and the reasonable inferences therefrom.

Summit now seeks the review by this Court of the Eighth Circuit's opinion which affirmed the district court's judgment nov for Respondent.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED BECAUSE THE LOWER COURT'S ACTIONS CONFLICT WITH PREVIOUS DECISIONS OF THE SUPREME COURT AND,

CERTIORARI SHOULD BE GRANTED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT SANCTIONED A DEPARTURE BY THE DISTRICT COURT WHICH SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION.

The lower court's decisions were contra to *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996) and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993).

The jury resolved the disputed factual assertions in favor of Iris Summit. Summit is, thus, entitled to the full benefit of all facts that she proved at trial and the reasonable inferences therefrom.

The principle question is whether Summit's working conditions preceding her resignation were sufficiently hostile to support the jury's verdict which held that Summit was constructively discharged. Summit, a nineteen (19) year veteran employee of Skil, resigned her position as an assembly line supervisor on October 28, 1994. Summit had been transferred to the second shift in June of 1994 to supervise an assembly line comprised primarily of 46 temporary employees. Temporary employees worked for less pay than regular employees, received no benefits, and at least one-third walked off the job before ever becoming qualified as a regular employee.

Summit had been given a two-week medical leave by her physician because of stomach problems and loss of sleep caused by the stress of her job. The continued stress of supervising her assembly line comprised of 46 temporary employees and attempting to make production with faulty parts from vendors, the threat of termination, and the anxiety of having David Hoffman, a male with less experience and seniority promoted to a supervisory position over her, certainly qualifies as substantial evidence to support the jury's verdict. When Summit resigned on October 28, 1994, she had held the position of supervisor over the assembly line of 46 temporary employees on the second shift since her transfer in June of 1994, almost five (5) full months with the exception of one week's medical leave. This was within the 180-day window of the EEOC charge and certainly was substantial evidence. The district court believed there was sufficient evidence to go to the jury, and the jury confirmed Summit's contentions as to sexual harassment through a hostile environment.

The United States Court of Appeals for the Eighth Circuit affirmed the district court's judgment notwithstanding the verdict of Summit's claims of constructive discharge. The district court held that substantial evidence did not support the verdict. Judge Magill, writing for the Eighth Circuit, correctly noted that the district court's order "relied solely on this Court's ruling in *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996)." Judge Magill, on page 10 of his opinion, affirmed the district court's judgment nov herein, stating,

> ". . . Summit's evidence does not establish that the Company acted with the intention of forcing Summit to resign or that a reasonable person would have found her conditions of employment intolerable. First, her transfer to the second shift, complete with temporary employees and defective parts, is indistinguishable from *Tidwell*. In *Tidwell*, the plaintiff's work assignment was changed and no constructive discharge was found."

Summit respectfully draws attention to the error in Judge Magill's logic. The case at bar is distinguished from *Tidwell* as follows.

Tidwell walked off his job soon after becoming disgruntled with scheduling. While it is true *Tidwell* was scheduled to work with untrained employees, *Tidwell* did not stick with his job for almost five months as did Summit. *Tidwell* made no real attempt to resolve his dispute or the situation with the untrained employees. Summit, on the other hand, spoke to Frank Saterfiel, David Hoffman, Steve Engelken, material control manager, and Delbert Warner, parts coordinator. Specifically, Summit requested more

trained "regular" employees to help with her 46 temporary employees, as Summit only had two "regular" employees to help train the 46 temporaries. Normal procedure had previously been to integrate a few temporary employees with regular employees until the temporaries became trained. Summit received no help from any of the men she spoke to, only their sympathy. Summit's work environment with the 46 temporary employees existed on the date of her resignation, obviously within the 180-day statutory period of her EEOC charge.

In his opinion on page 10, Judge Magill correctly quotes *Tidwell* as follows,

> "A constructive discharge arises only when a reasonable person would find the conditions of employment intolerable. To act reasonably, an employee has an obligation not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving his employer a reasonable change to work out a problem has not been constructively discharged."

Judge Magill, however, fails to acknowledge that Summit made every attempt possible to correct her problem during her five-month stint with the 46 temporaries. Summit went to various supervisors, Frank Saterfiel, David Hoffman, Steve Engelken, material control manager, and Delbert Warner, parts coordinator, and requested more "regular employees" to help her train the temporaries, but to no avail. The fact that David Hoffman's position over Summit was created coinciding with Summit's transfer to the second shift line with 46 temporaries, and David Hoffman's position was eliminated soon after Summit's resignation, is suspect. One

can speculate that Hoffman was promoted to this position as a form of further harassment, intimidation, embarrassment, etc., to Summit. Judge Magill states,

> ". . ., merely because Summit 'lost a single promotion opportunity to an arguable better qualified candidate, the overwhelming compulsion to quit that is necessary for constructive discharge [was] not created.'" *Tidwell*, 93 F.3d at 495.

One must not forget that the jury heard evidence that Hoffman got his promotion and his recommendations primarily through the actions of Randy Guthrie, plant manager. It was for the jury to determine the credibility of the witnesses and their testimony. For Judge Magill to now retry the case in this manner is error.

Skil's policy included the option of discharge after two written reprimands. Summit had received two written reprimands within a four-month period. Summit believed that these reprimands were unjustified, that she was being set up for discharge, and that the next step would be her discharge. The jury found Summit's testimony credible.

Judge Magill, to his credit, acknowledged Summit's evidence,

> "by first noting that she was a nineteen-year veteran employee who had never received a written reprimand before March 1994."

Furthermore, Judge Magill noted she presented evidence of

> "[(1)] her transfer to the second shift where she had the responsibility of supervising 46 temporary employees with only two regular employees to help train [and] given defective parts from vendors to use in the assembly of the items built on her line by the temporaries [;(2)] the stress on her because she was unable to make production, stress from the two previous reprimands and the threat of discharge, and the stress and frustration from having an inferior employee, David Hoffman, with less experience and seniority, promoted to a position immediately over her [and] David Hoffman's position of temporary unit manager, supervising Summit, only existed for approximately one month past Summit's resignation [;and (3) the fact] that sixty (60%) percent of the menial positions on the line [are] filled by women as compared to twenty-seven (27%) percent of supervisory positions being filled by women."

Summit respectfully disagrees with the logic of the lower court when it states,

> "Notwithstanding Summit's argument to the contrary, the district court properly granted the Company judgment as a matter of law because there was not substantial evidence to support the jury's verdict."

Although the district court excluded evidence of prior sexual harassment of a continuing nature, which originated with the request by Frank Saterfiel that Summit go out with him in 1986, Summit contends that the evidence the district

court did allow, and which the jury found to be credible, will be discussed at this time.

Summit only asks that this Court review the judgments of the lower courts by the same standard in *Tidwell* and *Harris*.

In *Tidwell*, the court stated,

> "In a motion for [a judgment as a matter of law], the question is a legal one, whether there is sufficient evidence to support a jury verdict. This court must analyze the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. We have also stated that to sustain a motion for [a judgment as a matter of law], all the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party. *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992) (footnote and citations omitted); *see also Jarvis v. Sauer Sundstrand Co.*, 116 F.3d 321, 324 (8th Circuit 1997)."

Summit requests that the Court review this matter with the following Latin phrase in mind: *Non sub homine sed sub deo et lege* -- It is not by men but by God and the law [that we are governed]. Summit submits that Judge Magill merely erred in applying the law of his own case, *Tidwell*, to the facts herein. Based on the evidence he acknowledged (and that which he overlooked), it is difficult to understand how he reasoned that "all the evidence pointed one way and was susceptible of no reasonable inference sustaining the position

of the nonmoving party" which Judge Magill himself acknowledged was the standard that the movant in a motion for a judgment as a matter of law must bear.

In this case, Summit has alleged a hostile work environment claim which caused her constructive discharge. "A hostile work environment is an ongoing nightmare for the employee victim, in legal parlance, a 'continuing violation.'" *Gipson v. Kas Snacktime Co.*, 83 F.3d 225, 229 (8th Cir. 1996). Hostile work environment harassment arises when "sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 474 (8th Cir. 1995) (quoting *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013 (8th Cir. 1988)). In *Hukkanan v. International Union of Operating Engineers, Local 101*, 3 F.3d 281 (8th Cir. 1993), the Eighth Circuit held a plaintiff alleging constructive discharge need only show that her resignation was a reasonably foreseeable consequence of the employer's discriminatory actions.

In assessing the [illegible]y of an environment, a court must look at the totality of the circumstances. *Stacks v. Southwestern Bell Yellow Pages*, 27 F.3d 1316, 1327 (8th Cir. 1994). Circumstances to be considered include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23. No single factor is determinative, *see id.*, and the court "should not carve the work environment into a series of discrete incidents and then measure the harm occurring in each episode." *Burns v. McGregor Electronics Industries, Inc.*, 955 F.2d at 564 (8th Cir. 1992). Even a single incident of

sexual harassment can in some circumstances suffice to state a claim of hostile work environment sexual harassment. *See, e.g., Torres v. Pisano*, 116 F.3d 625, 631 n.4 (2nd Cir. 1997).

Summit contended in her complaint that she was constructively discharged because of sexual harassment. The district court submitted the issue of constructive discharge to the jury with its instructions. Skil has not cross-appealed any issue, i.e., questioned this instruction, other than its motion for nov (lack of substantial evidence). The lower court has quibbled over the fact that the matter was submitted to the jury on constructive discharge rather than sexual harassment. The question of whether alleged harassment is sufficiently severe or pervasive for purposes of establishing hostile work environment is "quintessentially a question of fact," *see Beardsley v. Webb*, 30 F.3d 524, 530 (4th Cir. 1994) (citation omitted). The district court, and the Eighth Circuit Court of Appeals, by affirming the district court, have taken the most cherished right of an American citizen away from Summit, the jury verdict. The district court and the Court of Appeals have erroneously determined the outcome of the case, and have erroneously done so by determining issues of fact that have already been decided by the jury. Pursuant to this Court's own standards in *Harris* and the Court of Appeals for the Eighth Circuit in *Tidwell*, set out above, this is error.

Immediately prior to trial, the district court granted Skil's motion in limine, prohibiting Summit from discussing any direct or indirect evidence of sexual harassment which occurred during or prior to 1988 involving the actions of Frank Saterfiel, one of Skil's immediate supervisors in 1988 and 1994. The district court also limited Summit from any direct or indirect reference to evidence of retaliation for

complaining of the sexual advancements of Frank Saterfiel made toward her in 1988. The district court prevented a witness for Summit, the human resource manager for Skil up until 1992, Merle Young, from testifying that Frank Saterfiel created an unhealthy situation for Summit, that Saterfiel was tactless and used poor judgment, and placed undue pressure on Summit. The district court further prevented Young from testifying that Saterfiel had received counseling from Skil because of a negative opinion survey conducted by Skil. Even though this background evidence was withheld from the jury, the jury found for Summit on the evidence that was submitted.

The case law is clear that mistreatment alone does not make out a case for age discrimination. Thus, the Eighth Circuit has recognized the difficult burden placed on plaintiffs to prove motive. Several discrimination cases have been remanded when the district court excluded evidence it found irrelevant and unduly prejudicial. In *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir.), *cert. denied*, 498 U.S. 854, (1990), the plaintiff alleged gender discrimination and retaliation. The district court excluded evidence of sexual harassment against the plaintiff and other employees. The Eighth Circuit found that "the evidentiary exclusions were erroneous and deprived [plaintiff] of a full opportunity to present her case to the jury." In doing so, the court recognized that an employer's past discriminatory practice can illustrate that proffered reasons are pretext for intentional discrimination.

Hawkins cited an earlier case, *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097 (8th Cir. 1988), where a plaintiff was not allowed to introduce evidence tending to show a "climate of race and age bias." The court noted that an employer's background of discrimination is indeed relevant

to proving a particular instance of discrimination. *Id.* at 1103.

Summit has alleged sexual discrimination in the form of harassment by Skil, creating a hostile environment.

Summit must prove that her resignation was a constructive discharge and that the actions which Skil now wishes to limit were in fact motivated by its discriminatory intentions through Saterfiel, Hoffman, Meyer and Guthrie. Summit must prove that their actions are pretextual and that "but for her age, and/or sex, Summit would not have been subject to the adverse action."

The disciplinary actions taken against Summit on March 8, 1994 and August 11, 1994 are further evidence of the hostile environment that Summit alleges. Summit contends that the two reprimands she received during her 19-year tenure with Skil were contrived and unfounded, based solely on Skil's motive of discrimination and intent to cause Summit to eventually resign.

The testimony of Merle Young as to the perceived "unfair" treatment of Summit by Skil during Summit's employment was limited by the lower court.

The facts upon which Merle Young would have expressed an opinion were based upon his personal knowledge of the matter and should have been included under Federal Rules of Civil Procedure 602 and pursuant to Rules 401, 402 and 701 of the Federal Rules of Evidence. Rule 401 states that "relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Certainly, Frank Saterfiel's prior conduct would fall within

this Rule. Rule 402 simply states that all relevant evidence is admissible and irrelevant evidence inadmissible. Because of Rule 401, evidence of Frank Saterfiel's prior harassment of the Summit is relevant and admissible. Rule 701 states,

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witnesses' testimony or the determination of a fact in issue." (As amended Mar. 2, 1987, eff. Oct. 1, 1987.)

Merle Young's statement that Frank Saterfiel created an unhealthy situation by criticizing Summit in front of her employees and placed undue stress on her, and that Frank Saterfiel received counseling from Skil in an effort to improve Saterfiel's manner of dealing with problems certainly would be relevant pursuant to Rule 701.

Estes acknowledges that circumstantial proof in discrimination cases "typically includes unflattering testimony about the employer's history," but that "such background evidence may be critical for the jury's assessment of whether a given employer was more likely than not to have acted from an unlawful motive." *Estes*, 856 F.2d at 1103. Saterfiel's prior conduct toward Summit, and counseling by Skil, is relevant and probative to establish the motives of Saterfiel, Hoffman, Meyer and Guthrie for which Skil must take responsibility for their actions.

As discussed above, proving an employer's motive is critical and difficult, and evidence of the work place

atmosphere is relevant. Summit's efforts to prove unlawful motives should not be thwarted by the elimination of her means of proof--direct and circumstantial evidence. In *Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987), Judge Posner explained:

> Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it ... The law tries to protect average and even below-average workers against being treated more harshly than would be the case if they were a different race..., but it has difficulty achieving this goal because it is so easy to concoct a plausible reason for...firing...a worker who is not superlative. A plaintiff's ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings that keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.

Id. at 697-98.

Federal courts have long recognized that blanket evidentiary exclusions are especially damaging in employment discrimination cases because plaintiffs must persuade the factfinder to disbelieve the employer's own motives. *Estes v. Dick Smith Ford*, 856 F.2d 1097 (8th Cir. 1988). In *Estes*, the plaintiff, a 52-year-old black male, was terminated. He sued, alleging age and race discrimination. The trial court excluded in limine evidence indicating a climate of race and age bias in the work place. Estes appealed, arguing that because of the evidentiary exclusions, he was unable to persuade the jury of discriminatory motive. The Eighth

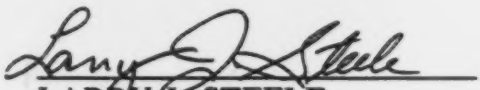
Circuit agreed, holding that the ruling deprived Estes of full opportunity to present his case and remanding the case for a new trial. Similarly, in *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990), the court held that evidence as to harassing conduct of others should have been admitted, even though not charged by the plaintiff. The court stated: "Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial." *Id.* 155-56.

In the case at bar, Summit can only prevail by proving discriminatory motive. To do this, she must be allowed to show the climate of the work place, particularly as it related to her supervisor, Frank Saterfiel, and his prior conduct toward her.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3814

Iris M. Summit,	*	
	*	
Appellant,	*	
	*	Appeal from the
	*	United States District
	*	Court for the Eastern
	*	District of Arkansas
S-B Power Tool,	*	
(Skil Corporation), a	*	
Division of Emerson	*	
Electric Company,	*	
	*	
Appellee.	*	

Submitted: May 22, 1997
Filed: August 13, 1997

Before MURPHY, HEANEY, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

Iris Summit appeals the district court's[1] entry of judgment notwithstanding the verdict for S-B Power Tool (the Company) in this constructive discharge action. On appeal, Summit argues that: (1) because there was substantial evidence to support the jury's verdict, the district court erred by granting a judgment as a matter of law; (2) the district court erred in limiting the evidence that Summit could present; and (3) the district court erred in failing to instruct the jury on punitive damages. We affirm.

I.

Summit, a 54-year-old woman, worked for the Company for nineteen years before resigning on October 28, 1994. Immediately prior to her resignation, Summit held the position of line supervisor on the second shift.

In December 1993 or January 1994, Human Resources Manager Donna Meyer first heard complaints regrading favoritism in the assignment of overtime by Summit. Although there had been an employee survey done about six months earlier that indicated no problems with Summit's performance, three employees complained to and were questioned by Meyer. After consulting with the plant manager, Randy Guthrie, the employees on Summit's line were interviewed. Over half of the employees indicated that they were having problems with Summit because of the way overtime was distributed, because of favoritism, or because of lack of communication.

---

[1]The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas.

Summit's direct supervisor, Frank Saterfiel, was then told of the complaints. Together, Meyer and Saterfiel prepared an issues and objectives sheet to inform Summit of the problems and to give her recommendations for improvement. On March 11, 1994, Meyer and Saterfiel met with Summit to discuss Summit's performance and give her their recommendations. Summit claims that she was only following Saterfiel's orders by assigning overtime to people who knew how to do the work and that Saterfiel told her to continue to schedule overtime "like we've always done the overtime." Trial Tr. at 20 (testimony of Iris Summit).

In April 1994, Summit's regular performance review was due. Saterfiel prepared Summit's review and sent it to Guthrie for his signature. Based on this review, Summit was to receive an increase in pay. However, Guthrie chose to postpone her review and raise for three months because of the problems she was having. See id. at 110. Following the delay, in July, the Company believed Summit had shown improvement and gave her the review along with a retroactive pay increase. Id. at 126, 140, 152.

For its busy season, the Company typically hires temporary employees and adds additional lines on a second shift. In June 1994, Summit was temporarily transferred to the second shift to supervise a line of temporary employees. Due to their high turnover rate, the temporary employees were more difficult to manage.

When Saterfiel approached Summit about the transfer, her told her, "I'm moving you to second shift. You are going to have to take care of the Moto tool lines and accessories." Id. at 21 (testimony of Iris Summit). When

Summit told Saterfiel that she "didn't want nothing to do with that," id. at 22, Saterfiel responded, "I need you to go to it." Id. Regarding the motive for Summit's transfer, Guthrie, Meyer, and Saterfiel stated that, after considering Summit's problems with the employees she currently supervised, they wanted to give Summit a fresh chance to interact with a new set of employees. Id. at 111-12, 139, 154-55. However, Summit claims Saterfiel explained her assignment to second shift by stating, "I'm going to give you a break. . . .Usually, I don't send a woman to do a man's job. I want you to know this is a break for you." Id. at 30-31 (testimony of Iris Summit); but see id. at 144 (Saterfiel testifying that he made no such statement.)

Also in June 1994, David Hoffman, a younger male employee with less experience, was promoted to the position of temporary unit manager of the second shift and Summit's immediate supervisor. According to the Company, Hoffman was selected for the position over Summit because he received better performance ratings and because Summit had received a performance warning in March. See id. at 114 (testimony of Donna Meyer). However, Summit claims that Saterfiel explained Hoffman's supervisory position over Summit by saying, "[w]e've got to have somebody on [the line] to watch you women. We can't leave you women out there. No telling what ya'll would do if there wasn't a man to watch over you." Id. at 30; but see id. at 144 (Saterfiel testifying that he made no such statement).

On August 11, 1994, Summit received a written performance warning. This warning was based on a memorandum written by Hoffman and Saterfiel. Hoffman complained that, after the decision was made to shut down

one of the lines due to quality problems, he asked Summit to explain to her employees why the line was being shut down and why they were being sent home, but Summit failed to do so. Furthermore, Hoffman stated that other employees had left work because Summit failed to notify them that they were required to work late. Hoffman concluded that Summit had a problem communicating with employees on an individual basis. Following discussions between Meyer, Hoffman, and Saterfiel, a written warning was given to Summit by Saterfiel. The warning stated that Summit had sixty days to "correct [the] problems or further disciplinary action may be taken that could lead to termination." Appellee's App. at 42.

After the August warning, no formal disciplinary action was ever taken against Summit, and the sixty-day time period came and went. Trial Tr. at 64 (testimony of Iris Summit). However, Summit claims that both Saterfiel and Hoffman told her that she was going to be fired. Id. at 31, 64; but see id. at 78 (testimony of David Hoffman), 134 (same); 142 (testimony of Frank Saterfiel). Summit's frustration with supervising an assembly line of temporary employees and her fear of being fired resulted in her not being able to sleep and her stomach hurting continuously. In late August, Summit's physician gave her medication for anxiety and Summit took a week of medical leave. When Summit returned, "[a]ll the people were real glad to see [her]. . . . And David Hoffman said that he didn't realize how much that [she] had actually done. . . . [H]e was really glad to see [her] back." Id. at 32 (testimony of Iris Summit).

Summit also claimed that, "while all this was going on," the following interchange occurred between herself and Saterfiel:

> [O]ne day he asked me, "How come Donna [Meyer] don't like you?" And I said, "I don't know. I didn't know she didn't." And he said, "Well, she is doing some weeding. Maybe she is just weeding out the old ones." I said, "Well, then, that means you will be going with me; right?" And he said, "Well, I should have said 'weeding out the old women.'"

Id. at 42; but see id. at 144 (testimony of Frank Saterfiel).

On October 17, 1994, Summit quit her job. The Company asserts that, when she resigned, Summit stated she was leaving to return to the nursing profession and pursue her certification as a registered nurse (RN). Id. at 117 (testimony of Donna Meyer), 133 (testimony of David Hoffman), 142 (testimony of Frank Saterfiel). However, at trial Summit claimed that she had never told anybody that her reason for resigning was to go back to nursing. Id. at 61, see also id. at 33, 37. One month after she resigned, Summit began working as a licensed practical nurse (LPN). On her application for this position, Summit stated her reason for leaving the Company as '"[r]eturn to nursing.'" Id. at 62, 171. When she left the Company, Summit was receiving $15.21 per hour. Her starting pay as an LPN was $7.25 per hour.

On February 15, 1995, Summit filed a charge of sex and age discrimination against the Company with the Equal Employment Opportunity Commission (EEOC). The EEOC issued a right to sue letter and Summit filed suit on December 21, 1995. Summit brought her action pursuant to both the Age Discrimination in Employment Act of 1967, 29 U.S.C.

§§ 621-634 (1994) (ADEA), and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1994) (Title VII).

Before trial the Company made a motion in limine requesting the district court to enter an order to prevent mention of alleged discriminatory events for which Summit had not filed a timely charge of discrimination with the EEOC. The Company argues that:

> A plaintiff who claims discrimination must file a charge of discrimination "within one hundred and eighth days after the alleged unlawful employment practice occurred. . . ." 42 U.S.C. § 2000e-5(e)(1). [Summit] filed her EEOC charge on February 15, 1995, thus any acts occurring before August 15, 1994 are not actionable.

Def.'s Br. in Supp. of its Mot. in Limine at 6-7. Thus, the Company sought to exclude any reference to Summit's alleged sexual harassment by Saterfiel in 1988, Summit's temporary transfer to the second shift in July 1994, Summit's non-promotion to the temporary position of Unit Manager in July 1994, and the disciplinary actions taken against Summit on March 8, 1994, and August 11, 1994. In reference to the alleged sexual harassment in 1988, the Company also noted that Summit's EEOC did not include, as a basis for discrimination, retaliation for her contemporaneous reporting of the alleged harassment to the Company. Id. at 5.

Summit responded to the Company's motion in limine by arguing that:

> Although [Summit] may not be able to obtain relief for those discriminatory acts which occurred outside the window of the EEOC charge, it has long been held that other acts of discrimination outside of the charge period are properly admissible as general background information that is relevant in deciding whether or not the acts complained about during the charge period are more likely to have occurred than not.

Pl.'s Br. in Supp. of Her Resp. to Def.'s Motion in Limine at 2.

At trial, the district court allowed as background the presentation of evidence regarding events occurring before August 15, 1994, more than 180 days before the EEOC claim was filed. Specifically, the district court allowed testimony regarding Summit's transfer to the second shift in July 1994, Summit's non-promotion in July 1994, and both disciplinary actions taken against Summit on March 8, 1994, and August 11, 1994. However, the district court would not allow Summit to present evidence of sexual harassment that allegedly occurred in 1988. The district court held that "it is too remote. In 1988, that is going back six years from these events that the complaint was made about. It seems to me that would just not be relevant." Trial Tr. at 39. The proffered testimony related to Saterfiel's attempt to get Summit to date him. Summit's counsel stated that:

> The plaintiff would testify that Mr. Saterfiel approached her, Mrs. Summit, and tried to get her to date him or go out with him. He was

> married at the time and she refused his advances and complained to her supervisors about that. And she and Mr. Saterfiel both were counseled at that time. And she would testify his attitude toward her then changed from one of approaching her in a social nature to one of harassment which continued on up through the filing of these charges.

Id. at 39-40. Summit also wanted to call Merle Young, a former Human Resources Manager for the Company. Summit's counsel proffered that:

> Mr. Young would also testify he is aware of some opinions of the defendant which reflected Mr. Saterfiel had employee relation problems, that Mr. Saterfiel was counseled because of that, and he would testify Mr. Saterfiel caused undue stress on Mrs. Summit because of the way he would discipline her in front of other employees, and that this was carried on up until [Young's] tenure ended in 1993.

Id. at 41.

At the close of the case, the district court also denied Summit a punitive damages instruction. The jury returned a verdict in favor of Summit on her Title VII claim and for the Company on the ADEA claim. The jury found that Summit had been constructively discharged on the basis of sex, but not on the basis of age.

The district court then entered judgment for the Company notwithstanding the verdict. The district court held that substantial evidence did not support the verdict. The district court found that Summit had resigned her position to re-enter the health care profession and that the only evidence to the contrary was Summit's own conclusory statements. The district court's order relied solely on this Court's ruling in Tidwell v. Meyer's Bakeries, Inc., 93 F.3d 490 (8th Cir. 1996). Summit appeals.

II.

Notwithstanding Summit's argument to the contrary, the district court properly granted the Company judgment as a matter of law because there was not substantial evidence to support the jury's verdict. Summit summarizes the evidence by first noting that she was a nineteen-year veteran employee who had never received a written reprimand before March 1994. Furthermore, she presented evidence of

> [(1)] her transfer to the second shift where she had the responsibility of supervising 46 temporary employees with only two regular employees to help train [and] given defective parts from vendors to use in the assembly of the items built on her line by the temporaries [;(2)] the stress on her because she was unable to make production, stress from the two previous reprimands and the threat of discharge, and the stress and frustration from having an inferior employee, David Hoffman, with less experience and seniority, promoted to a position immediately over her [and] that

> David Hoffman's position of temporary unit manager, supervising Summit, only existed for approximately one month past Summit's resignation[; and (3) the fact] that sixty (60%) percent of the menial positions on the line [are] filled by women as compared to twenty-seven (27%) percent of supervisory positions being filled by women.

Appellant's Br. at 27-28. Summit argues that she was the victim of sexual harassment, that sexual harassment created a hostile work environment, and that the hostile environment supports the jury verdict that she was constructively discharged.[2] We disagree.

---

[2]On appeal, the company objects to Summit's argument regarding sexual harassment and hostile work environment because only a constructive discharge claim went to the jury. The Company notes Summit's failure to object when the jury instructions did not contain instructions on sexual harassment or on hostile work environment. See Verdict Form, reprinted in Appellant's App. at Tab U; Jury Instructions, reprinted in Appellant's App. at Tab V (No. 1, 7, 9, 13). Because only a claim of constructive discharge went to the jury, we will consider no other claims on appeal. See Singleton v. Wulff, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); Ford Motor Co. v. Summit Motor Prod., Inc., 930 F.2d 277, 295 (3d Cir. 1991) (holding that reviewing court would not consider an issue raised on appeal but not considered by jury at trial); Lambur v. Yates, 148 F.2d 137, 138 (8th Cir. 1945) ("Ordinarily under these circumstances an appellate court will refuse to review the judgment of a trial court entered upon the verdict of a jury. On appeal the parties are usually restricted to the theory on which the cause was tried in the lower court." (citations omitted)).

In reviewing a judgment as a matter of law, this Court uses the same standard as the district court:

> In a motion for [a judgment as a matter of law], the question is a legal one, whether there is sufficient evidence to support a jury verdict. This court must analyze the evidence in the light most favorable to the prevailing party and must not engage in a weighing or evaluation of the evidence or consider questions of credibility. We have also stated that to sustain a motion for [judgment as a matter of law], all the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the nonmoving party.

White v. Pence, 961 F.2d 776, 779 (8th Cir. 1992) (footnote and citations omitted); see also Jarvis v. Sauer Sundstrand Co., 116 F.3d 321, 324 (8th Cir. 1997).

The evidence Summit presented does not support a finding of constructive discharge. This Court has articulated the standard for constructive discharge as follows:

> To constitute a constructive discharge, the employer must deliberately create intolerable working conditions with the intention of forcing the employee to quit and the employee must quit. The plaintiff can satisfy the intent requirement by demonstrating that he quit as a reasonably foreseeable consequence of the employer's discriminatory actions.

> A constructive discharge arises only when a reasonable person would find the conditions of employment intolerable. To act reasonably, an employee has an obligation not to assume the worst and not to jump to conclusions too quickly. An employee who quits without giving his employer a reasonable chance to work out a problem has not been constructively discharged.

Tidwell, 93 F.3d at 494 (citations omitted) (emphasis added).

At bottom, Summit's evidence does not establish that the Company acted with the intention of forcing Summit to resign or that a reasonable person would have found her conditions of employment intolerable. First, her transfer to the second shift, complete with temporary employees and defective parts, is indistinguishable from Tidwell. In Tidwell, the plaintiff's work assignment was changed and no constructive discharge was found. Id. at 496 ("Dissatisfaction with work assignment is, as a matter of law, normally not so intolerable as to be a basis for constructive discharge." (citing Carter v. Ball, 33 F.3d 450, 459 (4th Cir. 1994) (Dissatisfaction with work assignments, a feeling of being unfairly criticized, or difficult or unpleasant working conditions are not so intolerable as to compel a reasonable person to resign."))).

Second, Summit's stress--caused by her inability to improve productivity, two previous reprimands, having a less experienced employee promoted to a position immediately over her, and the threat of discharge--does not automatically translate into constructive discharge. There is no evidence that sex discrimination, rather than performance problems,

prompted the reprimands. Furthermore, Hoffman's promotion over Summit does not constitute constructive discharge. Simply put, merely because Summit "lost a single promotion opportunity to an arguably better qualified candidate, the overwhelming compulsion to quit that is necessary for constructive discharge [was] not created." Tidwell, 93 F.3d at 495.

This Court has not directly ruled on whether the mere threat of being discharged for cause would lead a reasonable person to find his or her conditions of employment intolerable. We hold that an employee's being told that he or she will be fired for cause does not, in and of itself, constitute constructive discharge. See Hill v. St. Louis Univ., 923 F.Supp. 1199, 1209 (E.D. Mo. 1996) ("The only basis for [plaintiff's] claim of constructive discharge is that on December 1, 1993 she was told that unless she resigned, she would be terminated. Plaintiff offers no legal support for her contention that notice of termination and choosing to resign instead is a 'constructive discharge'. It is clear that it was not her working conditions that 'forced' plaintiff to resign, but rather being informed that she was being terminated from her employment. Consequently, merely being informed of termination cannot constitute a 'constructive discharge'."); but cf. Downey v. Southern Natural Gas Co., 649 F.2d 302, 305 (5th Cir. 1981) (holding that an employee being apparently singled out and told his company had nothing for him to do and that he was in danger of being discharged and losing retirement benefits created a sufficiently contested issue of material fact to make summary judgment on the employee's age discrimination claim improper).

Third, Summit's statistical evidence creates only the weakest inference that the Company acted with the intention of forcing Summit to resign and provides no support for a finding that a reasonable person would have found Summit's conditions of employment intolerable.

Therefore, because the jury's verdict was not supported by substantial evidence, the district court properly granted the Company's motion for judgment notwithstanding the verdict.

III.

Summit next argues that the district court erred in limiting the evidence that Summit could present regarding the Company's actions taken prior to the 180-day window of the EEOC charge.[3] Citing Hawkins v. Hennepin Technical Center, 900 F.2d 153 (8th Cir. 1990) (granting new trial when, although sexual harassment was not charged, plaintiff should have been permitted to introduce additional evidence regarding specifics of such harassment), and Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988) (holding that background evidence about defendant's work force was admissible, although plaintiff presented an individual disparate treatment case, rather than a disparate impact case),

---

[3]We note that August 19, 1994, was 180 days prior to the date Summit filed her EEOC charge. The only evidence that the district court excluded prior to that date related to the alleged sexual harassment in 1988. The district court allowed Summit to introduce evidence prior to the window of the EEOC charge. This evidence included: Summit's satisfactory employee survey done in the summer or fall of 1993; the warnings given in March and August 1994; and the transfer to second shift in June 1994.

Summit notes that other acts of discrimination outside the charge period are properly admissible as general background information and are relevant in deciding whether or not the acts complained about during the charge period are more likely to have occurred than not. Specifically, Summit asserts that the district court erred by limiting Summit's presentation of evidence concerning sexual harassment by Saterfiel in 1988. We disagree.

The trial court's exclusion of evidence is entitled to substantial deference on review. See Hawkins, 900 F.2d at 155. The district court excluded the evidence because it was not actionable due to Summit's failure to file a timely EEOC charge, see 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighth days after the alleged unlawful employment practice occurred. . . ."), and because it was too remote.

Although a "blanket evidentiary exclusion" of background information would be "especially damaging in employment discrimination cases," Estes, 856 F.2d at 1103, that is not the case here. Rather than a blanket exclusion, the district court excluded only the allegations regarding sexual harassment in 1988 and admitted the balance of Summit's background information. In fact, all of the alleged actions of the Company--the reprimands, Summit's transfer, the threats of being fired--took place 180 days prior to Summit's EEOC claim. Moreover, although the evidence that Summit was sexually harassed in 1988--six years prior to her alleged constructive discharge--may have some slight relevance in showing motive, this evidence does nothing to show that in 1994 a reasonable person would have been compelled to quit.

Lastly, the cases relied upon by Summit are distinguishable. In Hawkins, the excluded evidence had greater relevance because that case involved a claim of discrimination and unlawful retaliation following complaints of sexual harassment, rather than a claim of constructive discharge. See Hawkins, 900 F.2d at 153. Similarly, in Estes the plaintiff was not asserting a claim of constructive discharge as he was discharged by his employer. See Estes, 856 F.2d at 1100.

Therefore, we hold that the district court properly excluded the presentation of evidence concerning sexual harassment in 1988.

IV.

Summit also argues that the district court erred by failing to instruct the jury on punitive damages. We disagree.

Under Title VII, punitive damages may be recovered "if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1) (1994). Even assuming that there was sufficient evidence for a jury to conclude that the Company intentionally discriminated against Summit, there was not sufficient evidence of malice or reckless indifference to submit a punitive damages instruction to the jury.

V.

Accordingly, the judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3814EAJ

Iris M. Summit,	*	
	*	
Appellant,	*	
	*	Order Denying Petition
v.	*	for Rehearing and
	*	Suggestion for Rehearing
S-B Power Tool, etc.,	*	En Banc
	*	
Appellee.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 30, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

IRIS M. SUMMIT — PLAINTIFF

V. No. J-C-95-318

S-B POWER TOOL
(Skil Corporation) a
division of Emerson
Electric Co. — DEFENDANT

ORDER

The defendant, at the close of the plaintiff's case and at the close of all the evidence, moved for judgment in its favor as a matter of law. I reserved ruling on the motions.

The defendant contends that there is no substantial evidence to support the jury's verdict that the plaintiff suffered sex discrimination in violation of Title VII or that she suffered a constructive discharge. I agree with the defendant.

The only adverse employment decision within the 180-day period prior to the plaintiff's filing a charge of discrimination with the Equal Employment Opportunities Commission ("EEOC") was what plaintiff contends was a constructive discharge. Such a discharge is totally unsupported by the evidence in this case.

The evidence indicated that plaintiff resigned her position with the defendant to re-enter the health care profession in which she was a licensed practical nurse. The only evidence to the contrary consisted of plaintiff's own conclusory statements. Although plaintiff testified that she resigned because of the pressure and because of her belief that she was about to be fired, based on the evidence, I find no reasonable basis for her belief.

> To constitute a constructive discharge, the employer must deliberately create intolerable working conditions with the intention of forcing the employee to quit, and the employee must quit.

Tidwell v. Meyer Bakeries, Inc., 93 F.3d 490, 494 (8th Cir. 1996). The facts in Tidwell are remarkably similar to the case at bar. In both cases, the principal complaint of discrimination involved a transfer to work as supervisor of the second shift, which was considered to be undesirable because of the quality of the employees and the temporary nature of the employment. Not only is this record devoid of proof that the plaintiff's transfer involved sex discrimination, but even if there were such proof, this type of transfer is not a proper basis for a claim of constructive discharge.

> Dissatisfaction with a work assignment is, normally, not so intolerable as to be the basis for constructive discharge.

Id. at 496.

Plaintiff's other sex discrimination complaint was that

a male, David Hoffman, was selected in preference to her for a position as temporary unit supervisor. The testimony is undisputed that, while plaintiff was a good employee, Hoffman had a better record with the company.

> In this instance, however, when Tidwell lost a single promotion, opportunity to an arguably better qualified candidate, the overwhelming compulsion to quit that is necessary for constructive discharge is not created.

Id. at 491.

It should be noted that both of the alleged acts of sex discrimination occurred more than 180 days before the filing of plaintiff's EEOC complaint.

In Tidwell v. Meyer's Bakeries, Inc., supra, the Court of Appeals set aside a jury verdict on behalf of the plaintiff and entered judgment for the defendant as a matter of law. I am unable to distinguish Tidwell from the case at bar.

The motions on which I reserved ruling are now granted, and judgment will be entered for the defendant, S-B Power Tool, as a matter of law, notwithstanding the jury verdict.

DATED this 17th day of October, 1996.

/s/ Henry Woods
UNITED STATES DISTRICT JUDGE

[Filed October 18, 1996]

Supreme Court, U.S.
FILED
FEB 4 1998
CLERK

No. 97-1091

In The

Supreme Court of the United States

October Term, 1997

IRIS M. SUMMIT,

Petitioner,

v.

S-B POWER TOOL (Skil Corporation)
a division of Emerson Electric,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Eighth Circuit render a decision which conflicted with previous decisions of the Supreme Court?

Did the United States Court of Appeals for the Eighth Circuit sanction a departure by the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision?

PARTIES TO THE PROCEEDINGS AND DISCLOSURE PURSUANT TO RULE 29

The Respondent, S-B Power Tool Co., was previously a joint venture of Robert Bosch Corp. and Emerson Electric Co. S-B Power Tool is now a wholly owned subsidiary of Robert Bosch GmbH. Robert Bosch Corp. is also a wholly owned subsidiary of Robert Bosch GmbH, which is owned by Robert Bosch Stiftung.

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STATEMENT OF THE CASE

On October 1 and 2, 1996, this case was tried to a jury. The Petitioner, Iris M. Summit ("Summit"), alleged that she was constructively discharged based upon her age and her sex in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and Title VII, 42 U.S.C. § 2000e-5 *et seq.* The Respondent, S-B Power Tool ("S-B Power Tool"), moved for judgment as a matter of law at the close of Summit's case and at the close of all of the evidence, but the trial court reserved judgment on the motion. On October 2, the jury returned a verdict in favor of Summit on her sex discrimination claim, but against her on her age discrimination claim. The Court declined to enter judgment on the verdict and instead entered judgment as a matter of law in favor of S-B Power Tool.

Prior to her resignation, Summit worked as a supervisor at S-B Power Tool. In approximately January 1994, problems regarding alleged favoritism with overtime assignments by Summit came to the attention of the Human Resources Manager, Donna Meyer ("Meyer"), when three employees who worked for Summit came to her office to complain regarding Summit. Following an investigation, Summit was given a warning in March 1994 regarding various performance issues and her review and raise were postponed. Once she showed signs of improvement, she was given her review and a retroactive raise.

S-B Power Tool's business is seasonal. Typically from June to December, it hires temporary employees and adds additional lines on the second shift to get out the extra

production necessary during its busy season. Prior to the busy season in June of 1994, the decision was made to temporarily transfer Summit to the second shift. In addition to Summit being a good choice, Meyer and supervisors in Summit's chain of command felt that a temporary move to a new group of employees would give Summit a fresh start from the problems she had experienced previously. Summit's replacement was a female, Sue Rogers ("Rogers"). Over the years, young males were also temporarily transferred to the second shift.

Also in June of 1994, David Hoffman ("Hoffman"), a male, was promoted to temporary unit manager on the second shift. His performance ratings were consistently better than Summit's ratings and he did not have any disciplinary action on his record, while Summit had received a disciplinary action three months previously.

Summit exhibited problems again which eventually led to her receiving a written warning on August 11, 1994. The warning gave her sixty days to improve her performance or further disciplinary action could be taken that could lead to termination. No problems occurred relating to Summit during that sixty day period.

Summit filed a charge of discrimination on February 15, 1995. Evidence of alleged discriminatory events which included two disciplinary actions, a transfer, and a promotion of a male employee was admitted for the limited purpose of providing background evidence, as each event occurred more than 180 days before Summit filed her charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). Summit could not

recover for events which occurred prior to August 19, 1994.[1] Summit introduced no evidence of discriminatory actions within the 180 days prior to the date she filed her charge.

On October 10, sixty days elapsed from the date of Summit's last warning with no further disciplinary problems. However, on October 17, 1994, Summit quit her job. Nothing significant occurred between August 19 and October 17. When she quit, Summit had received no more disciplinary actions since the August 11, 1994 warning and was not facing discharge. She had been working on the second shift and had been responsible for her temporary employees for three months. Furthermore, it had been approximately two months since Hoffman received his temporary promotion. Significantly, both females and males took up Summit's former job responsibilities after she quit.

Another supervisor, Bobby Luster ("Luster"), a male, resigned in lieu of termination on August 11, 1994. Significantly, Luster received a written warning around the

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[1] S-B Power Tool filed a Motion in Limine to exclude certain evidence. At the end of Summit's testimony, the trial judge excluded evidence of an alleged sexual advance by a supervisor which occurred at least six years prior to the time that Summit resigned her position. There was no allegation that the supervisor ever made any other advances after he was allegedly disciplined for his conduct. Additionally, the trial court excluded some testimony of a witness who left the company at least one year prior to Summit's resignation. Finally, the judge excluded testimony regarding retaliation for refusing to submit to sexual advances six years previously as the result of remoteness, relevance and Summit's failure to file a charge on the issue.

time that Summit received her verbal warning in writing and was terminated on the same day Summit received her written warning on August 11. Luster had also been transferred to the second shift.

REASONS TO DENY THE WRIT

A. SUMMARY OF ARGUMENT

In support of its Petition for Certiorari, Summit lists two grounds for this Court to take up this case. She alleges that the lower court's actions conflict with previous United States Supreme Court decisions and that the Court of Appeals sanctioned a departure by the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. First, the Eighth Circuit Court of Appeals decision does not conflict with any Supreme Court decision. Rather, it is supported by significant and substantial case law. Second, Summit completely fails to establish that the lower court decisions so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Neither of these issues are sufficient to warrant review by the Supreme Court, and the Petition should be denied.

Review on a writ of certiorari is not a matter of right, but of judicial discretion. Rule 10 of the Rules of the Supreme Court of the United States. A petition for a writ of certiorari will be granted only for compelling reasons. Rule 10. The types of reasons the Court will consider includes the Court of Appeals deciding an important

federal question in a way that conflicts with relevant decisions of the Supreme Court or the Court of Appeals so far departing from the accepted and usual course of judicial proceedings, or sanctioning such a departure by a lower court, as to call for an exercise of the Supreme Court's supervisory power. Rule 10. This Petition and the issues presented therein satisfy none of the criteria for the Supreme Court to grant certiorari.

B. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE SUMMIT HAS NOT ESTABLISHED THAT THE LOWER COURTS' DECISIONS CONFLICT WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

Summit asserts that the decisions of the trial court and the Eighth Circuit Court of Appeals conflict with previous decisions of the Supreme Court. Summit claims that the lower court decisions were contrary to an Eighth Circuit case, *Tidwell v. Meyer's Bakeries, Inc.*, 93 F.3d 490 (8th Cir. 1996), and a United States Supreme Court case, *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). *Tidwell* is a constructive discharge case, while *Harris* is a sexual harassment case. Because there is absolutely no merit to this assertion, it is inappropriate for the Court to grant certiorari based upon this ground.

In the Petition for Writ of Certiorari on page 7, Summit characterizes the "principle" question as "whether Summit's working conditions preceding her resignation were sufficiently hostile to support the jury's verdict" and cites to *Harris*. Summit's emphasis on the law relating to hostile work environment sexual harassment is

misplaced as her case was not tried as a sexual harassment case. Moreover, this is not the standard for establishing constructive discharge.

The jury instructions submitted by the parties and given by the trial judge indicate that this case was tried as a constructive discharge claim based upon sex and age. Summit submitted no jury instructions on hostile work environment and the instructions actually given by the court did not instruct the jury on sexual harassment or hostile work environment. At the time that Summit agreed to the instructions submitted by S-B Power Tool, the trial court had not yet ruled upon S-B Power Tool's Motion in Limine to exclude certain evidence; thus, Summit cannot argue that the jury was not instructed on sexual harassment as the result of the trial judge's ruling on admissibility of sexual harassment evidence. Counsel for Summit had an obligation to object to instructions and to proffer instructions to give to the jury on these issues if in fact those were the claims on which Summit rested her case, but did not do so. As a result, Summit's arguments now regarding sexual harassment are meaningless as the jury was never instructed on this issue and never rendered a finding on the issue. Thus, any argument regarding hostile work environment is not relevant to the decision whether there was sufficient evidence to support the jury's verdict that Summit was constructively discharged based upon her sex.

As recognized by the Court of Appeals, "[b]ecause only a claim of constructive discharge went to the jury, we will consider no other claims on appeal." Petition, p. 11a. Thus, Summit is restricted to the claims submitted to the jury, which do not include hostile work environment

sexual harassment. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Ford Motor Co. v. Summit Motor Prod., Inc.*, 930 F.2d 277, 295 (3d Cir. 1991), *cert. denied*, 502 U.S. 939 (1991); *Lambur v. Yates*, 148 F.2d 137, 138 (8th Cir. 1945).

On page 7 of the Petition, Summit asserts that the jury confirmed Summit's contentions as to hostile work environment sexual harassment. Such an assertion is completely without basis as the jury was never instructed on hostile work environment and it never made any findings with regard to harassment.

Even if the case had been tried as a sexual harassment case, Summit does not state how the Court of Appeals' decision conflicts with relevant decisions of this Court such as *Harris*. In fact, the Eighth Circuit's decision in no way conflicts with *Harris* as *Harris* did not even address the standard for constructive discharge.

Summit also argues that the Eighth Circuit Court of Appeals decided her case contrary to another Eighth Circuit case, *Tidwell*. Deciding a case contrary to another case in the same circuit is not the type of compelling reason this Court requires in order to grant certiorari. *See* Rule 10.

Both the trial court and the Court of Appeals recognized that the case at hand was remarkably similar to *Tidwell*. Summit now argues that *Tidwell* is in fact distinguishable and attempts to distinguish the case, pointing out facts that Summit believes the Court of Appeals, specifically Judge Frank Magill who authored both *Tidwell* and the decision at hand, failed to recognize. While Summit argues that this case is distinguishable from and decided wrongly in light of *Tidwell*, "[a] petition for a

writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Rule 10. Summit does not assert that the rule of law from *Tidwell* or any other case was improperly stated, just that the lower courts erred in applying the properly stated law to the facts herein. Thus, even assuming that the Eighth Circuit decision misapplied the correct law to Summit's facts, this reason is insufficient for the Supreme Court to use its valuable resources.

> The Court can, and should, establish and police a framework for the delegation and exercise of responsibility to and by the lower courts. Except in relatively rare situations justifying immediate intervention, the court as manager would accord a presumption of regularity and validity to the decisions of state and lower federal courts. A wise manager delegates responsibilities to subordinates and, absent an indication that something is awry, accords their decisions a presumption of validity. To do otherwise is to denigrate the authority of subordinate actors, thereby diminishing their own sense of responsibility and ultimately increasing the manager's tasks as well as the overall workload.

Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana, 472 U.S. 237, 282, n. 78 (1985) (Brennan, J., dissenting) (quoting Estreicher & Sexton, New York University Supreme Court Project 14-15 (executive summary), 59 N.Y.U.L. Rev. 677, 717-718 (1984)). As a wise manager, the Supreme Court should not intervene in this case.

More basically, the Court of Appeals properly decided this case. Both lower courts properly recognized that there was not sufficient evidence to support the jury

verdict that Summit was constructively discharged because of her sex. As the Court of Appeals correctly recognized, "Summit's evidence does not establish that the Company acted with the intention of forcing Summit to resign or that a reasonable person would have found her conditions of employment intolerable. First, her transfer to the second shift, complete with temporary employees and defective parts, is indistinguishable from *Tidwell*." Petition, p. 13a. Significantly, the events in the two months prior to Summit's resignation would not have compelled a reasonable person to give up her employment. The evidence in this case is such that reasonable persons could not differ as to the conclusion that Summit failed to meet her burden as to an element essential to her case. *Mulholland v. Schneider Serv. Co.*, 661 F.2d 708, 711 (8th Cir. 1981). Summit failed to establish that S-B Power Tool deliberately created intolerable working conditions with the intention of forcing her to quit. *Tidwell*, 93 F.3d at 494; *West v. Marion Merrill Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995); *Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1991). A "reasonable person" in Summit's position would not have felt compelled to resign. *West*, 54 F.3d at 497, quoting *Bunny Bread*, 646 F.2d at 1256; *Tidwell*, 93 F.3d at 494. A reasonable person would not find his or her conditions of employment intolerable simply because he or she supervised temporary employees. Supervisors before, during and after the time period of June through October 1994 were required to supervise temporary employees. Further, Summit merely requesting that regular employees be added to the shift is not sufficient action required to work out the problem.

Summit failed to establish that she faced objectively intolerable working conditions. *Tidwell*, 93 F.3d at 497. Importantly, other supervisors besides Summit, including males, had to work on the second shift and with temporary employees.

Summit also failed to show that an adverse action occurred during the limitations period as required to state a claim for constructive discharge. *See Stephney v. Hospital for Joint Diseases*, 1985 WL 4271, 48 Fair Empl. Prac. Cas. (BNA) 775, 778 (S.D.N.Y. 1985). At the time that Summit quit, conditions did not exist that were sufficient to cause a constructive discharge as nothing occurred in the relevant time period before Summit quit which would compel a reasonable person to quit her job. The events which Summit claims forced her to resign, *i.e.*, promotion of a male, transfer to another shift made up of mostly temporary employees, and reprimands, occurred outside of the 180 days prior to filing her charge and at least four months prior to her resignation. A reasonable person would not have felt compelled to resign because adverse action did not occur near the time of the resignation. *See Steele v. Offshore Shipbuilding*, 867 F.2d 1311, 1317 (11th Cir. 1989); *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984).

Summit produced no evidence that the reason for S-B Power Tool's actions was sex discrimination. *Chambers v. American Trans Air, Inc.*, 17 F.3d 998, 1006 (7th Cir. 1994), *cert. denied*, 513 U.S. 1001 (1994). In fact, males were treated like Summit; thus, "no particular employee can claim that difficult working conditions signify the employer's intent to force that individual to resign."

Allen v. Bridgestone/Firestone, Inc., 81 F.3d 793, 797 (8th Cir. 1996) (citations omitted).

While *Tidwell* is remarkably similar to the situation at bar, Summit produced even less compelling evidence than the evidence in *Tidwell*. Thus, like in *Tidwell*, Summit failed to establish a constructive discharge.

In summary, Summit has failed to establish that the Court of Appeals' decision conflicts with any previous decisions of the Supreme Court. First, the Supreme Court case cited by Summit does not conflict with the Court of Appeals decision as *Harris* is a sexual harassment case, while the case at bar concerns an alleged constructive discharge because of sex. Second, a petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law, as is asserted here. Third, judgment as a matter of law was properly granted because there was not sufficient evidence to support the jury verdict that Summit was constructively discharged.

C. THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE SUMMIT FAILED TO ESTABLISH THAT THE EIGHTH CIRCUIT COURT OF APPEALS SANCTIONED A DEPARTURE BY THE DISTRICT COURT WHICH SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Summit's second ground for certiorari is that the Eighth Circuit sanctioned a departure by the trial court which so far departed from the accepted and usual course

of proceedings as to call for an exercise of the Supreme Court's power of supervision. Summit does not explain how the Eighth Circuit sanctioned this departure and what exactly this departure was.

Presumably, Summit asserts that the trial court improperly granted judgment as a matter of law in favor of S-B Power Tool on the sex discrimination claim pursuant to Rule 50 of the Federal Rules of Civil Procedure and the Court of Appeals improperly upheld this grant of judgment as a matter of law. First, as set forth above, both lower courts properly recognized that there was not sufficient evidence to support the jury verdict that Summit was constructively discharged because of her sex. Even assuming that a court could find that judgment as a matter of law should not have been granted or that the evidence was improperly excluded, such action does not so far depart from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Summit also finds fault with the exclusion of certain evidence at trial. However, Summit fails to establish that the trial court abused its discretion in excluding evidence. *U.S. v. Hazelett*, 32 F.3d 1313, 1316 (8th Cir. 1995). As recognized by the Court of Appeals, the district court properly limited Summit's evidence concerning prior sexual advances toward her during or prior to 1988 in proving her claim of constructive discharge. The evidence was irrelevant and prejudicial. Summit never filed an EEOC charge concerning these events and did not submit any jury instructions on this issue.

Evidence of retaliation for having complained about sexual harassment in 1988 was also properly excluded because it was irrelevant and prejudicial, because Summit failed to file a charge of discrimination with the EEOC for retaliation, and because she did not try the case as a retaliation case and submitted no jury instructions on this issue. *See* Rules 401 and 403 of the Federal Rules of Evidence. Any evidence relative to the time-barred claim of retaliation was not relevant to her claim of constructive discharge based upon her sex or age, was inadmissible, and would have been highly prejudicial.

Additionally, exclusion of certain testimony by Merle Young ("Young") was properly excluded. Young had no personal knowledge of Summit's claim of discrimination and did not work at S-B Power Tool when any of the events of which Summit complained and which she claimed caused her to resign occurred. The testimony of Young was not relevant evidence and the admission of this evidence would have unjustly prejudiced S-B Power Tool, confused the issues, misled the jury, and would have resulted in a waste of time and needless presentation of cumulative evidence due to the tenuous connection this "evidence" would have to Summit's claims of gender discrimination. Rule 401, 402, and 403 of the Federal Rules of Evidence.

A trial court's exclusion of evidence under Fed. R. Evid. 402 and 403 is entitled to substantial deference on review. *Warner v. Transamerica Ins.*, 739 F.2d 1347, 1350 (8th Cir. 1984). The trial judge was in the best position to determine the propriety of excluding evidence. Even if the exclusion was error, it did not affect a substantial right of Summit and constituted harmless error. Rule

103(a) of the Federal Rules of Evidence; *U.S. v. DeAngelo*, 13 F.3d 1228, 1233 (8th Cir. 1994), *cert. denied*, 512 U.S. 1224 (1994). With regard to the exclusion of the evidence, Summit was not hampered in any way in showing that adverse action was taken against her within the 180 days prior to her filing of a charge of discrimination.

Summit cites *Hawkins v. Hennepin Technical Center*, 900 F.2d 153 (8th Cir. 1990), *cert. denied*, 498 U.S. 854 (1990), and *Estes v. Dick Smith Ford*, 856 F.2d 1097 (8th Cir. 1988), in support of her argument that the lower court improperly excluded evidence. *Estes* is distinguishable because the trial court granted the exclusions before the trial began; thus, the Court of Appeals examined the consequences of the exclusion with particular care. *Estes*, 856 F.2d at 1103. In contrast, the trial judge in this case made its determinations of probative value and prejudice after Summit finished her testimony.

Further, in *Hawkins* and *Estes*, the plaintiffs needed some latitude in presenting evidence to show motive. In contrast, the evidence proffered by Summit did not go to show motive or pretext. Significantly, Summit failed to establish that a reasonable person would have been compelled to quit and that there was action that occurred near the time Summit quit or within the relevant time period. The deficiency in Summit's case was not motive.

The Federal Rules of Civil Procedure provide mechanisms for federal judges to grant motions for judgment as a matter of law, even if granting such motions results in the nullification of a jury's verdict. Further, the Federal Rules of Civil Procedure also provide the mechanism for federal judges to use their individual discretion to limit

evidence to be submitted to the jury. In this case, the district court judge merely used his discretion and judgment through the mechanism provided by the Federal Rules of Civil Procedure. Judges do this every day. Summit simply disagrees with the judge's exercise of discretion and judgment within the authority given him by the Federal Rules of Civil Procedure. However, such a disagreement is not a valid basis for granting a writ of certiorari.

In summary, Summit has not established that the Court of Appeals sanctioned a departure by the district court which so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Certainly, the grant of judgment as a matter of law or the exclusion of some evidence is not the kind of departure required for the Supreme Court to take the unusual step of exercising its power of supervision. Furthermore, the trial court properly granted judgment as a matter of law and properly excluded evidence.

CONCLUSION

Summit has failed to show grounds for certiorari to be granted on this matter. For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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